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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JEFFREY GONG, Individually and as
Trustee, etc.,

Plaintiff and Appellant,

v.

DAVID GONG, Individually and as Trustee,
etc.,

Defendant and Respondent.

D055080

(Super. Ct. No. GIC859527)

(Super. Ct. No. GIC868426)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Hayes, Judge. Affirmed.

This action arises out of a dispute between two brothers, plaintiff Jeffrey Gong (Jeff), individually and as trustee of The Paul Trust No. 1, and defendant David Gong (David),¹ individually and as trustee of The Ray Trust No. 1, over three pieces of real property Jeff and David own under an agreement entitled "Tenants in Common

¹ Because the parties to this appeal are brothers, in the interests of clarity we refer to them by their first names. We intend no disrespect. Additionally, we refer to Jeffrey as Jeff as both parties do so.

Agreement" (TIC Agreement). Under that agreement, there are certain buyout procedures if one of the parties desires to sell his interest in the properties. Jeff filed a complaint against David seeking specific performance under a section of the buyout provisions that allows one party, under certain conditions, to demand a sale of the properties. In the alternative, Jeff sought a partition of the properties.

Following a court trial, the court found in David's favor, finding (1) Jeff could not maintain his action for specific performance because he had failed to comply with a provision in the TIC Agreement that required him to use diligent efforts to find a third party buyer of his interest in the properties for a period of 12 months before seeking a forced sale; (2) the dispute was not amenable to specific performance because it would require a "protracted and time-consuming sales procedure"; and (3) in the TIC Agreement the parties had explicitly waived their right to seek a partition of the properties.

Jeff appeals, asserting the court erred by (1) holding the sale provisions were not enforceable while holding the waiver of partition clause was; (2) holding a sale of the properties would be a "protracted and time-consuming sales procedure"; (3) finding Jeff's failure to make diligent efforts to sell his interest in the properties prevented him from demanding a sale under the TIC Agreement; (4) considering unsupported allegations of damage to their corporation as part of its decision; (5) using evidence of his "tax return problems" to deny his rights under the TIC Agreement; and (6) finding he had waived his right to seek a partition of the properties. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The TIC Agreement*

Jeff and David own RFG Oil, Inc. (RFG), which owns and operates "quick lube" franchises in Southern California. David has a 51 percent ownership interest in RFG and Jeff owns 49 percent. The three properties Jeff and David own that are the subject of this dispute are leased to RFG for use in operating the quick lube franchises.

Jeff and David's rights and obligations with regard to the properties are governed by the TIC Agreement. The TIC Agreement states that David and Jeff each own a 50 percent undivided interest in the properties. The TIC Agreement requires that they share all profits, losses and distributions generated by the properties in accordance with their ownership interest.

Paragraph 8 of the TIC Agreement provides for buy-out procedures upon sale of an owner's interest. If one of the parties desires to sell his interest, he is to give the other party a notice of intent to sell, which triggers a 30-day period within which the other party may exercise an option to purchase the selling party's interest. If, after the expiration of the 30-day period the non-selling party elects not to buy the selling party's interest, the selling party may sell his interest to a third party "upon such terms and conditions as he desires within a period of 12 months." Thereafter, under paragraph 8(b) of the TIC Agreement, if "the Selling Party is unable to sell his interest in the Properties within the 12-month period set forth above, *and provided that the Selling Party has used diligent efforts in good faith to accomplish a sale at a reasonable market price and upon reasonable terms and conditions,*" the selling party may make a written demand for sale

of the properties. (Italics added.) The non-selling party then has another 30-day period to exercise his option to purchase the selling party's interest. If the second 30-day option period expires without the non-selling party exercising his option to buy the selling party's interest, the selling party may demand that the non-selling party "cooperate in the sale of the entire properties."

Further, paragraph 11 of the TIC Agreement provides that the sale provisions described above are a substitution for and waiver of the parties' right to seek a partition of the properties:

"No owner shall, either directly or indirectly, make an application to any court for partition of the Properties except as otherwise expressly provided herein. The parties agree to and hereby waive the right of partition with respect to the Properties, and agree that the provisions of this Agreement governing voluntary or involuntary sale are reasonable as a substitution for such right."

B. The Instant Action

In July 2007 Jeff filed a verified first amended complaint. The first cause of action sought specific performance of the TIC Agreement, seeking to sell Jeff's "interests in the subject properties pursuant to the procedures specified in paragraph 8 of the [TIC] Agreement." The complaint also specified that Jeff was giving David notice by the complaint of Jeff's "intent to sell." The complaint sought a decree of specific performance "requiring David to comply with the [TIC] Agreement's sale procedures"

The complaint also contained a cause of action for partition, requesting that "[i]n the event the [TIC] Agreement cannot be specifically enforced, [Jeff], in the alternative," seeks partition of the properties.

In November 2007 Jeff sent David a letter referencing the notice of intent to sell the properties in his complaint. The letter further stated, "Under the [TIC] Agreement, I have the right for one year to attempt to sell my interest; to and including August 20, 2008. I have tried but without success. I am writing to give notice of my decision to waive my right, effective immediately, to try to sell for the balance of the one year period."

David did not respond to the November 2007 letter.

In February 2008 Jeff wrote another letter to David. This letter referenced the November letter and his notice of his intent to waive his right to try to sell his interest in the properties. The letter demanded that the "entire Properties be sold for the best available price, terms and conditions."

David did not respond to the February 2008 letter.

In June 2008 a court trial was held in this matter. In his trial brief Jeff stated that he was seeking specific performance of the TIC Agreement, "specifically a sale of the Properties to a third party with a division of the proceeds between Jeff and David," or in the alternative "virtually the identical result via partition"

Jeff also asserted at trial that he was not required to make diligent and good faith efforts to sell the properties over a 12-month period, that that clause was voluntary only,

was intended to benefit Jeff by delaying the time for David to exercise his second option, and Jeff could therefore waive it.

In his trial brief David raised three defenses to Jeff's claims: (1) specific performance was not an available remedy because it would require the court to supervise the proposed sale of the properties over a long period of time; (2) the request for specific performance was premature because the 12-month period within which Jeff was required to use "diligent efforts" to sell his interest in the properties had not yet expired; and (3) in the TIC Agreement Jeff waived the right to seek a partition of the properties.

Jeff and David testified at trial. After the conclusion of their testimony, the court ordered the parties to submit written closing arguments.

In Jeff's closing argument brief he argued that David has "anticipatorily repudiated" the TIC Agreement in his answer to the complaint and discovery responses. He argued David's "anticipatory breach" allowed him to exercise his available remedies immediately, including the right to sue for specific performance. Jeff also argued the court had "plenary jurisdiction" to order specific performance of the sale procedures in the TIC Agreement and that would not require "impermissible judicial supervision of a protracted transaction" Jeff also requested that the court appoint a receiver to take control of the properties and effect their sale.

In his closing arguments David asserted that Jeff had failed to meet his burden of showing he was entitled to relief because (1) he expressly waived the right to seek partition of the properties; (2) the sale provisions of the TIC Agreement were not amenable to specific performance because they required intricate, protracted and time-

consuming sales procedures that were a succession of acts; (3) Jeff failed to use diligent efforts for 12 months to attempt to find a buyer for his interest in the properties before demanding their forced sale; (4) David did everything he was required to under the TIC Agreement; and (5) Jeff failed to show the inadequacy of legal remedies for any breach by David of the TIC Agreement.

In August 2008 the court issued its decision. The court first found that Jeff "has failed to prove the requisite elements of specific performance. An action for specific performance requires the party seeking specific performance must prove that he has performed under the contract or is excused from performance. In the instant case, Jeff has not performed nor is he excused from such performance. The evidence establishes that Jeff has not performed his obligation to use 'diligent efforts' to find a third party buyer of his one-half interest in the properties, nor has the requisite 12 months passed before demanding a forced sale of the properties in their entirety. [¶] Notwithstanding his testimony to the contrary, Jeff did not use due diligence to find a buyer for his interest. The Court does not accept the testimony of [Jeff] as credible, reliable or trustworthy. The evidence demonstrates Jeff has signed false tax returns which were filed under penalty of perjury in this matter, and to the extent that his testimony in any material respect differs from that of his brother David, it is to be disbelieved. Likewise, the testimony of [David] is accepted by this Court as trustworthy."

The court further found that "specific performance of the [TIC] Agreement signed by the parties would require a protracted and time-consuming sales procedure that is not generally seen as within the purview of enforcement in equity by means of specific

performance. It is suggested that a receiver may be appointed to accomplish this task. However, a receiver has not been sought nor would the appointment of a receiver at this time be warranted under the facts presented."

The court rejected Jeff's contention the "12-month period of 'due diligence' does not place any obligation on Jeff Gong but is actually for the benefit of [Jeff]" The court found that "such interpretation is belied by the words of the contract" Quoting paragraph 8(b) of the TIC Agreement, the court found "[t]his section sets forth conditions under which Jeff may demand David's cooperation in the sale of the properties in their entirety. The 12-month period and the use of good faith diligent efforts are prerequisites to any obligation on the part of [David] to cooperate in the selling of the entire properties. The assertion that [Jeff] could waive the 12 months is at variance with the explicit language of the contract."²

With regard to Jeff's cause of action seeking a partition of the properties, the court found that the right to "statutory partition has been waived by the parties according to the express terms of the [TIC] Agreement." Citing paragraph 11 of the TIC Agreement, the court noted "[t]he language is clear and explicit and binding on the contracting parties."

DISCUSSION

I. *PRINCIPLES OF CONTRACT INTERPRETATION*

We review the interpretation of a contract de novo when, as here, there are no disputed material facts regarding its meaning. (*ASP Properties Group, L.P. v. Fard, Inc.*

² References to "Jeff" within brackets here indicate the trial court mistakenly referred to "David." It is clear those references should have been to "Jeff."

(2005) 133 Cal.App.4th 1257, 1266-1267; *De Anza Enterprises v. Johnson* (2002) 104 Cal.App.4th 1307, 1314-1315.) "The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the 'mutual intention' of the parties. 'Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" (*id.*, § 1644), controls judicial interpretation. (*Id.*, § 1638.)' " (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.)

II. ANALYSIS

A. *Enforceability of Sale and Partition Provisions*

Jeff first contends that the court erred in finding the provisions in the TIC Agreement for sale of the properties not enforceable, while simultaneously finding the waiver of partition rights was enforceable. Jeff asserts this made the TIC Agreement "illusory" because the waiver of partition rights was in consideration and exchange for the parties electing to proceed by means of the sales procedures in the agreement.

However, the court did *not* find the sale provisions unenforceable. Rather, the court found that Jeff had not complied with those provisions by using diligent efforts to sell his half-interest in the properties for 12 months before seeking a forced sale of the properties. Indeed, the parties stipulated at trial that the TIC Agreement was valid and

enforceable. The issue before the court was whether Jeff was entitled to the *remedy* of specific performance to enforce the valid sales terms.

In order to prevail on a claim for specific performance, a party must satisfy five elements: (1) the contract is specifically enforceable; (2) there is adequate consideration and a just and reasonable contract; (3) the plaintiff has performed or is excused from performance; (4) the defendant has breached the contract; and (5) there is an inadequate remedy at law. (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 785, pp. 203-204.)

On appeal, Jeff does not dispute that there is substantial evidence to support the court's finding that he did not use diligent efforts to sell his interest in the properties over a 12-month period. Thus, the court properly found that he did not satisfy the third element of a cause of action for specific performance—that he performed under the contract. We shall discuss Jeff's contention that he was excused from satisfying the diligent efforts requirement, *post*.

Jeff argued to the trial court, and does so briefly in his reply brief, that he was not required to use diligent efforts to sell his interest in the properties. Rather, Jeff asserts that he could waive that provision because it was solely for his benefit because it acted to delay the time period within which David could exercise his second option to purchase Jeff's interest in the properties. However, this ignores the plain meaning of the TIC Agreement.

Paragraph 8(b) allows Jeff as the selling party to demand a sale of the properties in their entirety "provided" that he has made diligent efforts to sell his interest in the properties over a 12-month period. The clear import of this provision is that David is only

required to sell his interest in the properties if Jeff has made diligent and good faith efforts to avoid that result, thereby allowing David to retain his ownership interest. The court correctly found that the clear language of paragraph 8(b) barred a forced sale if Jeff failed to abide by its terms. There is nothing in paragraph 8(b) that allows Jeff to unilaterally decide that he is not going to attempt to sell his interest in the properties before compelling a sale of the properties in their entirety.

B. Court's Finding Case Not Amenable to Specific Performance

Jeff next contends the court erred when it concluded that specific performance was not available because it contemplated a "protracted and time-consuming sales procedure that is not generally seen as within the purview of enforcement in equity by means of specific performance." This contention is unavailing.

It is true that courts have deemed "archaic" the rule prohibiting specific performance "where the contracts stipulate a succession of continuous acts which require protracted supervision and direction by the court with the exercise of special knowledge, skill and judgment by the parties performing the acts." (*Ellison v. Ventura Port District* (1978) 80 Cal.App.3d 574, 580.) This rule "has been soundly criticized [citations] [and] its application generally is limited to building construction contracts and distribution or sales agency agreements." (*Okun v. Morton* (1988) 203 Cal.App.3d 805, 820-821.) According to Witkin, "better modern cases and other authorities reject this doctrine and give specific performance whenever it is practically feasible." (13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 45, p. 337.)

However, we need not address whether the court erred in making this finding as it was unnecessary to its decision. Because the court found Jeff had not performed under the TIC Agreement, we need not determine if the sale procedures, which were not triggered because of this failure of performance, were amenable to specific performance. We will affirm the judgment if correct on any ground. (*Muller v. Fresno Comm. Hosp. & Med. Ctr.* (2009) 172 Cal.App.4th 887, 906-907.)

Further, in support of his assertion that a forced sale of the properties is amenable to specific performance, Jeff relies on the statutory procedures for partition of real property. As we shall explain, *ante*, the parties waived the right to seek partition of the properties in the TIC Agreement.

C. Requirement That Jeff Make Diligent Efforts Not Excused

Jeff argues the court erred in finding that he was required to make diligent efforts over a 12-month period to sell his interest in the properties because he was not required to perform those conditions as a prerequisite to demanding a sale. Specifically, Jeff asserts "David's anticipatory repudiation in the form of his answer excused Jeff from any good faith or diligence requirement." We reject this contention.

"If a promisor *expressly repudiates* the contract by an unequivocal refusal to perform, he or she is guilty of an anticipatory breach." (1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 863, p. 951.) "But to have this effect the repudiation must be clear, positive, and unequivocal" (*Ibid.*)

In support of his assertion that David repudiated the contract, Jeff asserts that in paragraph 27 of David's answer he "denied the existence of the TIC [Agreement] and

denied that it governed the rights of himself and Jeff regarding the Properties." However, nothing in paragraph 27 of David's answer made such a claim.

Paragraph 27 of David's answer responded to paragraph 27 of Jeff's complaint, which stated, in the introduction to Jeff's second cause of action for breach of the TIC Agreement, "Plaintiff incorporates by this reference, paragraphs 1 through 22 and 24 through 26, above." In paragraph 27 of his answer David stated, "Answering Defendant admits that Plaintiff incorporates by reference the referenced paragraphs. Except as expressly admitted, Answering Defendant denies all of the remaining allegations of this Paragraph." Thus, there was no repudiation of the TIC Agreement in paragraph 27 of David's answer.

To the trial court, Jeff cited a different paragraph, No. 24, of David's answer as evidence of his anticipatory repudiation. That paragraph responded to paragraph 24 of Jeff's complaint, which stated, "Plaintiff wishes to sell his interests in the subject properties pursuant to the procedures specified in paragraph 8 of the Agreement. Pursuant to paragraph 8(a) of the Agreement, plaintiff hereby gives David notice, effective the date the Court grants leave to file this First Amended Complaint, of plaintiff's intent to sell." In response, David's answer stated, "Answering Defendant lacks information sufficient to enable an admission or denial to the allegations contained in Paragraph 24 of the Amended Complaint and, on that basis, denies those allegations." Again, nothing in David's response to paragraph 24 constituted a repudiation of the TIC Agreement. He simply alleged he had insufficient information to admit or deny Jeff's

allegation he was giving notice of his intent to invoke the sale provisions of that agreement.³

Further, at trial, David did not claim the TIC Agreement was invalid, and Jeff did not claim that David had repudiated the TIC Agreement. Indeed, as noted, *ante*, the parties *stipulated* that the TIC Agreement was enforceable. It was not until after trial in closing arguments that Jeff for the first time claimed there had been a repudiation. For this reason as well, the court did not err finding Jeff was required to make diligent efforts over a 12-month period to sell his interest in the properties.

D. Consideration of Damage to RFG

Jeff asserts the court erred by considering David's unsupported allegation in his trial brief that Jeff mismanaged RFG after an accident in 2001 left David a quadriplegic and Jeff took over management. This contention is unavailing.

Jeff takes issue with that portion of the court's decision that, in discussing the background of the case, noted that after David suffered a mountain climbing accident in Alaska which left him a quadriplegic, "Jeff ran the company resulting in large operating losses and declining revenue. David resumed duties of management and discovered Jeff had seriously mismanaged the business." Jeff asserts that these statements were improper

³ For the first time in his reply brief Jeff asserts that it was in paragraph 17 of his answer that David denied the existence of the TIC Agreement and thus was guilty of anticipatory repudiation. However, this paragraph was not cited to the trial court as a basis for a claimed repudiation, and we will not address a claim made for the first time in a reply brief. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4.)

because "no evidence whatsoever was introduced to prove this contention" and that it must have "contributed to the trial court's decision on all issues presented."

However, while it is true that these statements in the court's order came largely from David's trial brief, they merely served as background for the court's decision, and Jeff points to no evidence that these statements affected the court's ruling in any way. Rather, as discussed, *ante*, the court's decision was based upon the TIC Agreement and the undisputed fact that Jeff did not use diligent efforts to sell his interest in the properties for a period of 12 months.

E. Evidence of Jeff's False Tax Returns

Jeff asserts the court erred in considering evidence that he filed false tax returns for RFG because based on this evidence the court "eliminate[d] all of Jeff's rights" under the TIC Agreement. We reject this contention.

Jeff admits that the court had the discretion to consider that he filed false tax returns signed under penalty of perjury in considering his credibility. A person lacking in veracity is an untrustworthy witness and may be impeached by proof of this bad character trait. (Evid. Code, § 780, subd. (e) [trier of fact may consider a witness's "character for honesty or veracity"].)

Further, there is no basis for the claim that based upon this evidence the court "eliminate[d] all of Jeff's rights." Rather, the court found, based upon the evidence before it, that Jeff did not comply with the sale provisions of the TIC Agreement and therefore was not entitled to specific performance.

F. *Waiver of Partition Rights*

Jeff asserts that the court erred in finding that he waived his right to seek partition of the properties because the court's ruling "eliminated the consideration for the waiver and left Jeff with an illusory contract; one where he got the burden without the corresponding benefit." We reject this contention.

This assertion of error is merely a restatement of Jeff's first contention: that the court erred in finding the sale provisions unenforceable and the waiver provision enforceable. However, as we have already stated, this misstates the court's ruling. The court found that Jeff was not entitled to the remedy of specific performance because he had not complied with the terms of the TIC Agreement.

Further, there was no error in the court's finding of waiver as the parties in paragraph 11 of the TIC Agreement explicitly waived their rights to partition. Such waivers are valid and enforceable. (*American Medical International v. Feller* (1976) 59 Cal.App.3d 1008, 1014 ["[T]he right of partition may be waived by contract, either express or implied."].)

DISPOSITION

The judgment is affirmed. Defendant David Gong shall recover his costs on appeal.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.